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No. 13 Orig.

IN THE

Supreme Court of United States

IN THE MATTER OF THE APPLICATION OF W. L. ROE FOR A WRIT OF MANDAMUS AGAINST THE HON. J. GORDON RUSSELL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

APPLICATION FOR WRIT OF MANDAMUS

S. P. Jones,
Marshall, Texas,
Attorney and Counsel for Petitioner.

IN THE

Supreme Court of United States

IN THE MATTER OF THE APPLICATION OF W. L. ROE FOR A WRIT OF MANDAMUS AGAINST THE HON. J. GORDON RUSSELL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

To the Hon. Edward D. White, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

APPLICATION FOR WRIT OF MANDAMUS.

Now comes the petitioner, W. L. Roe, and moves for leave to file the petition for mandamus hereto annexed and moves that a rule be entered and issued directing the Hon. J. Gordon Russell, District Judge

of the United States for the Eastern District of Texas, and directing the District Court of the United States for the Eastern District of Texas to show cause why a writ of mandamus should not issue against them, and each of them in accordance with the prayer of said petitioner, and that said petitioner should have other and further relief in the premises as may be just and meet.

. . . . . ,
Counsel and Attorney for Petitioner.

IN THE

Supreme Court of United States

IN THE MATTER OF THE APPLICATION OF W. L. ROE FOR A WRIT OF MANDAMUS AGAINST THE HON. J. GORDON RUSSELL, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

To the Hon. Edward D. White, Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

The petition of W. L. Roe, who is a resident citizen of the United States, and of the City of Marshall, County of Harrison, State of Texas, and an inhabitant of the Eastern District of Texas; said petitioner respectfully shows:

I.

That your petitioner, W. L. Roe, on the 29th day of May, 1913, filed in the District Court for the 71st Judicial District of Texas, at Marshall, in Harrison County, Texas, a suit numbered therein 1583, against the Texas & Pacific Railway Company, claiming damages for personal injuries in the sum of thirty thousand dollars, based solely upon the liability of the Texas & Pacific Railway Company under the act of the Congress of the United States commonly known as the Employers Liability Act of 1908, as amended in 1910, which cause was removed to the District Court of the United States for the Eastern District of Texas at Jefferson, Texas, by the Railway Company, for the sole reason that it was a corporation chartered under an act of Congress of the United States and that suits against it in its corporate capacity were suits arising under the laws of the United States and removable to the district courts of the United States, your petitioner claims that suits against the Texas & Pacific Railway Company arising under the Employers Liability Act referred to cannot be removed from the state court to the district courts of the United States, and that his motion to remand should have been granted.

II.

ORIGINAL PETITION FILED IN STATE COURT.

It appeared from the original petition filed in said suit that the same was brought in the District Court of Harrison County, Texas, by the said plaintiff, W. L. Roe, against the defendant, Texas & Pacific Railway Company, a corporation created by and under an act of the Congress of the United States and being an inhabitant of Dallas County, Texas, and being engaged in the business of a common carrier by railroad, and engaged in commerce between the State of Texas and the State of Louisiana.

That the said suit was for damages for personal injuries received by the said W. L. Roe on or about the 15th day of January, 1913, in which it was alleged in substance that on said date the said W. L. Roe was an employee of the said defendant, and that the said defendant being engaged as a common carrier by railroad in commerce between the several states, that the said W. L. Roe was so employed by said carrier in such commerce between the State of Texas and the State of Louisiana, as a brakeman on a train running from Marshall, Texas, to Sodus, Louisiana, and that while so engaged the said W. L. Roe by reason of the negligence of the said defendant, Texas & Pacific Railway Company received personal injuries which resulted in whole from the negligence of the officers, agents and employees of the said Texas & Pacific Railway, and by reason of the defects and insufficiency in its cars and appliances due to its negligence; which personal injuries have incapacitated him to pursue any occupation by which he can earn any money, and that at the time of the said injury he was a strong man able to earn the sum of one hundred and twenty-five dollars per month. That the said plaintiff at the time he was injured was assisting in unloading freight from one of the cars in his train at Grand Cane, a station on defendant's railroad in Louisiana, and that by reason of a broken, defective and insufficient unloading dolly way or platform, that defendant negligently furnished, when plaintiff stepped upon same it gave way and caused him to fall and thereby inflicted upon him serious and permanent injuries for which he claimed damages.

That the plaintiff was injured solely by reason of the negligence of the defendant, and without any fault upon the part of the plaintiff.

III.

Your petitioner further shows that the defendant

was duly served with citation to appear in said court and answer said petition; that within the time required by law the said defendant filed in the District Court of Harrison County, Texas, a petition to remove the said cause from the said district court to the District Court of the United States for the Eastern District of Texas, and presented its motion for such removal. That said petition for removal is as follows:

In the District Court of Harrison County, Texas, Seventy-first Judicial District. W. L. Roe vs. The Texas & Pacific Railway Company. No. 1583.

PETITION FOR REMOVAL.

The petition of the Texas & Pacific Railway Company respectfully shows to the court:

First: That the Texas & Pacific Railway Company was, and is, a corporation, duly organized and existing under and by virtue of the laws of the United States, to-wit: "An Act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and Acts amendatory thereof and supplemental thereto, including an Act approved May 2, 1872, whereby among other things, the name, style and title of said Texas Pacific Railroad Company was changed to "The Texas & Pacific Railway Company."

Second. That the above entitled action was commenced in the above named court on the 29th day of May, A. D. 1913, and citation issuing therein was served upon this defendant on the 16th day of June, A. D. 1913, which said citation is returnable on the first Monday in July, A. D. 1913, it being the 7th day of July, and this defendant is not, and will not be required, by the laws of the State of Texas, or the rule of this court, to answer or plead to the petition

of the plaintiff before the 8th day of July, A. D. 1913.

Third. That the matter in dispute in this case exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and this suit arises under the laws of the United States as hereinbefore and hereinafter more fully set forth; that this action was brought by the plaintiff for thirty thousand ($30,000.00) dollars actual damages resulting from personal injuries received by W. L. Roe, on or about the 5th day of January, 1913, while the said Roe was working for the Railway Company as a freight brakeman on the train running from Marshall, Texas, to Sodus, La., and was injured at Grand Cane, La., as appears from plaintiff's petition, which is referred to for a more particular statement of the cause of action. That this suit against this defendant is a suit arising under the laws of the United States, and more especially under the laws of the United States, constituting the charter of this defendant, and under which it was incorporated, that is to say, the said act of Congress of the United States, approved March 3, 1871, entiled "An Act to incorporate The Texas & Pacific Railroad Company, and to aid in the ocnstruction of its road and for other purposes," and Acts amendatory thereof and supplemental thereto, approved respectively on May 2, 1872, March 3, 1873, and June 22, 1874.

Fourth. That the above entitled action is a civil suit arising under the laws of the United States of which the District Court of the United States for the Eastern District of Texas is given original jurisdiction by Act of Congress, approved March 3, 1911, to-wit: An Act entitled "An Act to codify, revise and amend the laws relating to the judiciary, designated as the judicial code."

Your petitioner herewith presents and files a good and sufficient bond, conditioned that it will enter and

file in the District Court of the United States for the Eastern District of Texas, within thirty days from the date of filing this petition, a certified copy of the record in this action, and for paying all costs that may be awarded by said district court if said court shall hold that said suit is wrongfully or improperly removed thereto, and to enter special bail in said suit, if special bail was originally requisite therein. Rour petitioner therefore prays the said court to accept said petition and bond, and remove this cause to the District Court of the United States for the Eastern District of Texas, and for such other relief in the premises as may be just and equitable.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By F. H. PRENDERGAST,
Attorney.

IV.

ORDER OF STATE COURT GRANTING REMOVAL.

That thereupon the said District Court of Harrison County, Texas, granted such petition to remove, which order is as follows:

W. L. Roe vs. Texas & Pacific Ry. Co.

On this the 8th day of July, 1913, came on to be heard the petition of the Texas & Pacific Railway Company to remove above styled and numbered cause to the Circuit Court for the Eastern District of Texas. Said petition being heard by the court, and it appearing that good and sufficient bond has been filed and that said petition shows proper grounds for removal. The prayer of said Ry. Co. is granted and its bond approved.

It is ordered by the court that the clerk of this court make up a transcript of the record in above cause to be filed in the Circuit Court for the Eastern District of Texas.

V.

MOTION TO REMAND.

Your petitioner further shows that within the time required by law, to-wit, on the 28th day of July, 1913, the defendant filed in the office of the clerk of the District Court of the United States for the Eastern District of Texas at Jefferson, Texas, a copy of the record in such suit where the same was numbered 609 and that on the 6th day of October, 1913, and before any other or further proceedings were had in the said cause in the District Court of the United States for the Eastern District of Texas, the plaintiff filed his motion to remand the said cause, which motion is as follows:

"*In the District Court of the United States for the Eastern District of Texas at Jefferson, Texas. W. L. Roe vs. Texas & Pacific Railway.*

To the Hon. Gordon Russell, Presiding Judge of Said Court:

Now, on this day comes the plaintiff by his attorney, S. P. Jones, and appearing specially for the purpose of this motion only, saving and reserving any and all objections he has to the manifold imperfections in the mode, manner and method of the removal papers, and respectfully denying that this court has jurisdiction of this cause, or the plaintiff therein, respectfully moves the court to remand this cause to the District Court for the 71st Judicial District in Harrison County, Texas, from which it was removed for the reason that this suit is not one that should be removed to the said United States District Court for the Eastern District of Texas or to any other United States District Court for the reason that the said case and the plaintiff's cause of action is one arising under the act of Congress commonly known as the Employer's Liability Act, as adopted in 1908 and amended in 1910 by the

provisions of which act it is specially provided that 'No case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.' That the said District Court of Harrison County, Texas, in which said suit was filed is a court of competent jurisdiction and having jurisdiction of this suit.

The plaintiff further shows that his petition in said suit as originally filed in the District Court of Harrison County, Texas, and all of his allegations in the said suit at the time the same was removed alleged and showed that the said cause of action sued upon by the plaintiff and involved in the said suit arose under the said Act of Congress and by reason of having been brought in the said state court, that the said defendant Railway Company could not remove the same to the said United States Court.

The plaintiff shows that the defendant claimed the right to remove the said cause from the District Court of Harrison County, Texas, to the United States District Court for the Eastern District of Texas upon the sole ground and for the sole reason that the said cause of action was one that arose under the laws of the United States, to-wit, that the said defendant was a corporation created and acting under and by virtue of a charter granted by the Congress of the United States.

Wherefore the premises considered the plaintiff prays that this his petition to remand the said cause to the District Court of Harrison County, Texas, be considered and granted, and that the said cause be remanded to the District Court of Harrison County, Texas, from whence it was improperly removed to this court.

S. P. JONES,
Attorney for Plaintiff.

I, S. P. Jones, attorney for W. L. Roe, plaintiff,

do solemnly swear that the statements contained in the foregoing motion to remand are true and correct.

S. P. JONES.

Subscribed and sworn to before me this 3d day of October, 1913.

(Seal.) ETHEL VAN HOOK,
Notary Public in and for Harrison County, Texas."

VI.

ANSWER TO MOTION TO REMAND.

Thereupon the defendant in said cause, the Texas & Pacific Company, filed the following answer to plaintiff's motion to remand said cause:

"*W. L. Roe vs. Texas & Pacific Railway Company.*

Now comes the defendant, the Texas & Pacific Railway Company and demurs to the plaintiff's motion to remand this cause to the state court, and shows that the said motion to remand the said cause to the state court is insufficient in that it shows no reason why the said cause should be remanded to the state court, in that, while it is true that the plaintiff's cause of action, as set out in his petition is one arising under the law commonly known as the Employer's Liability Statute of the United States, and inasmuch as the defendant is a corporation created by and operating under an Act of Congress, and as such is entitled to have causes of action brought against it removed to the District Court of the United States for the Eastern District of Texas, that this cause was properly removed to the said court, and should not be remanded.

F. H. PRENDERGAST,
Attorney for Texas & Pacific Railway Company."

VII.

HEARING AND DENIAL OF MOTION TO REMAND.

That subsequently and before any other or further proceedings were had in the said cause, the said motion to remand came on to be heard, and the same having been submitted on the record and briefs of plaintiff, your petitioner, and of defendant, the Texas & Pacific Railway Company, was overruled and denied by the said District Court of the United States, Hon. [redacted] Gordon Russell, judge sitting as judge of said court.

And the said Hon. [redacted] Gordon Russell, judge aforesaid, entered his order, judgment, and decree therein, overruling and denying the said motion to remand for the reason that in the opinion of the said court, that inasmuch as the defendant Railway Company had the right to remove the said cause to the District Court of the United States for the Eastern District of Texas upon the ground and for the reason that the defendant Railway Company is a federal corporation, created and acting under the laws and by the authority of an act of Congress, that the violation of the law known as the Employer's Liability Act relating to removal of causes does not deprive the said defendant of the right to remove the said cause. All of which appears in said bill of exceptions, a copy of said bill of exceptions being attached and marked Exhibit "A."

VIII.

MANDAMUS ONLY ADEQUATE REMEDY.

Your petitioner further shows that by the ordinary remedy of appeal from the final judgment of the District Court of the United States in said suit at law it may be and probably will be several years before the question of whether the said court should have retained jurisdiction of the said case can be considered,

and determined by this honorable Court; that your petitioner will be put to great expense, trouble and delay in prosecuting said suit in the said District Court of the United States for the Eastern District of Texas, the United States Circuit Court of Appeals, and in the Supreme Court of the United States, all of which your petitioner believes to be unnecessary by reason of the lack of jurisdiction of said district court. That by reason of all these facts and circumstances, your petitioner has no adequate remedy unless this honorable Court interferes by a writ of mandamus.

IX.

The petitioner further shows that he has furnished copies of this petition for mandamus and brief prepared by him to F. H. Prendergast, attorney of record for the Texas & Pacific Railway Company, and to the Honorable [redacted] Gordon Russell, District Judge of the Eastern District of Texas.

X

Wherefore your petitioner prays that a rule be made and issue from this honorable Court directed to the said Honorable [redacted] Gordon Russell, District Judge of the Eastern District of Texas, and directing the said judge of the District Court of the United States for the Eastern District of Texas to show cause why writ of mandamus should not issue, commanding the said judge and the said court, and each of them, to remand said suit at law to the District Court of Harrison County, Texas, and to desist from exercising any further jurisdiction in said suit except to enter an order remanding said suit, and for such other and further relief in the premises as shall seem just and meet and your petitioner will ever pray.

.....

Atty. and Counsel for Petitioner, W. L. Roe.

The State of Texas, County of Harrison.

I, S. P. Jones, being duly sworn, depose and say that I am attorney and counsel for the above named petitioner, W. L. Roe; that I have read the foregoing petition; that I have personal knowledge of all of the proceedings which have been had in the several courts mentioned in said petition, and of the facts therein referred to, and that the statements made in said petition are true and the copies of all the documents mentioned therein are true and correct copies of such originals and excerpts therefrom and the narratives thereof are true and correct, and are as affiant verily believes full and complete as to all material matters.

Sworn to and subscribed before me this .... day of December, 1913.

....,
Notary Public in and for Harrison County, Texas.

Exhibit "A."

"In the District Court of the United States for the Eastern District of Texas at Jefferson, Texas. W. L. Roe vs. Texas & Pacific Railway Company. No. .....

Be It Remembered: That on this the 7th day of October 1913 at a term of this court begun and holden in Jefferson in and for the Eastern District of Texas and before the undersigned District Judge, there came on to be heard the plaintiff's motion to remand this cause to the District Court of Harrison County, Texas, from which it had been removed by the defendant, and thereupon the plaintiff presented his motion to have the said cause remanded, which motion is as follows, to-wit:

'In the District Court of the United States for the Eastern District of Texas at Jefferson, Texas. W. L. Roe vs. Texas & Pacific Railway.

To the Hon. [redacted] Gordon Russell, Presiding Judge of Said Court:

Now on this day comes the plaintiff by his attorney S. P. Jones, and appearing specially for the purpose of this motion only, saving and reserving any and all objections he has to the manifold imperfections in the mode, manner, and method of the removal papers, and respectfully denying that this court has jurisdiction of this cause, or the plaintiff therein, respectfully moves the court to remand this cause to the District Court for the 71st Judicial District in Harrison County, Texas, from which it was removed for the reason that this suit is not one that should be removed to the said United States District court for the Eastern District of Texas or to any other United States District Court for the reason that the said case and the plaintiff's cause of action is one arising under the act of Congress commonly known as the Employer's Liability Act, as adopted in 1908 and amended in 1910 by the provisions of which act it is specially provided that "No case arising under this Act and brought in any State Court of competent jurisdiction shall be removed to any court of the United States." That the said District Court of Harrison County, Texas, in which said suit was filed is a court of competent jurisdiction and having jurisdiction of this suit.

The plaintiff further shows that his petition in said suit as originally filed in the District Court of Harrison County, Texas, and all of his allegations in the said suit at the time the same was removed alleged and showed that the said cause of action sued upon by the plaintiff and involved in the said suit arose under the said Act of Congress and by reason of having been brought in the said State Court, that the said defendant

Railway Company could not remove the same to the said United States Court.

The plaintiff shows that the defendant claimed the right to remove the said cause from the District Court of Harrison County, Texas, to the United States District Court for the Eastern District of Texas upon the sole ground and for the sole reason that the said cause of action was one that arose under the laws of the United States, to-wit, that the said defendant was a corporation created and acting under and by virtue of a charter granted by the Congress of the United States.

Wherefore the premises considered the plaintiff prays that this his petition to remand the said cause to the District Court of Harrison County, Texas, be considered and granted, and that the said cause be remanded to the District Court of Harrison County, Texas, from whence it was improperly removed to this Court.

S. P. JONES,
Attorney for Plaintiff.

I, S. P. Jones, attorney for W. L. Roe, plaintiff, do solemnly swear that the statements contained in the foregoing motion to remand are true and correct.

S. P. JONES.

Subscribed and sworn to before me this 3d day of October, 1913.

ETHEL VAN HOOK,
Notary Public in and for Harrison County, Texas.'

And thereupon came the demurrer to said motion, and his answer thereto, which is as follows:

'W. L. Roe vs. Texas & Pacific Railway Company.

Now comes the defendant, the Texas & Pacific Railway Company and demurs to the plaintiff's motion

to remand this cause to the State Court, and shows that the said motion to remand the said cause to the State Court is insufficient in that it shows no reason why the said cause should be remanded to the State Court, in that, while it is true that the plaintiff's cause of action, as set out in his petition is one arising under the law commonly known as the Employer's Liability statute of the United States, and inasmuch as the defendant is a corporation created by and operating under an act of Congress, and as such is entitled to have causes of action brought against it removed to the District Court of the United States for the Eastern District of Texas, that this cause was properly removed to the said Court ,and should not be remanded. The cause was removed because the Railway Company was chartered by Congress and not because it involved the "Employers Liability Act."

F. H. PRENDERGAST,

Atty. for Texas & Pacific Railway Company.'

And thereupon the said parties submitted the same upon the said motion and the said demurrer and it being agreed by the parties that the said plaintiff at the time he received the injuries sued for herein was in the employ of the said defendant, the defendant being at said time engaged as a common carrier by railroad in commerce between the State of Texas and the State of Louisiana, and the said plaintiff being at the said time employed by such carrier in such commerce between the State of Texas and the State of Louisiana, and the plaintiff's cause of action, if any, being founded upon the act of Congress relating to the liability of common carriers to their employees in certain cases commonly known as the Employers Liability Act of 1908, as amended in 1910, and the said court being advised of the law by the argument of counsel, thereafter at a subsequent day of a term of court to-wit 7th day of October 1913, the said demurrer was sustained

and the motion to remand was overruled, and denied as appears from judgment of the court, for the reason that in the opinion of the said court that inasmuch as the defendant Railway Company had the right to remove the said cause to the District Court of the United States for the Eastern District of Texas upon the ground and for the reason that the said defendant Railway Company is a Federal corporation created and acting under and by authority of an Act of Congress, that the violation of the law known as the Employers Liability Act relating to removal of causes, does not deprive the said defendant of the right to remove said cause; and plaintiff excepted to said order of court overruling said motion, and then and there prayed that his bill of exceptions might be sealed and upon due consideration the said bill of exceptions is sealed, approved, allowed and ordered filed as a part of the record in this case dated this 24 day of December, 1913.

GORDON RUSSELL,
District Judge.

JUDGMENT OVERRULED AND DENYING MOTION TO REMAND.

'In the District Court of the United States for the Eastern District of Texas at Jefferson, Texas. W. L. Roe vs. Texas & Pacific Railway.

On this the 14th day of October 1913, the court having duly considered the plaintiff's motion to remand this cause to the District Court of Harrison County, Texas, and defendant's demurrer, and answer to same, doth find that said demurrer and answer should be sustained, and the said motion to remand should be denied for the reason that while the court finds that the said cause of action as set out in the plaintiff's pleadings is one arising under what is commonly known

as the Employers Liability Act of Congress of 1908 as amended in 1910, which among other things provides that "no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States," that inasmuch as the defendant Railway Company is a corporation created and doing business under a charter granted by an Act of Congress of the United States, that the said provision of the Employers Liability Act referred to denying the right of removal of causes of action arising under that law is not applicable to suits against the defendant Texas & Pacific Railway Company.

It is therefore adjudged, decided and decreed that the said motion to remand be, and the same is overruled, and denied, to which judgment overruling the said motion said plaintiff then and there in open court excepted.

The plaintiff is granted an extension of forty two days in which to prepare, have approved and filed his bills of exceptions herein, and this cause is kept open for said purpose.

GORDON RUSSELL,
Judge.'

'In the District Court of the United States for the Eastern District of Texas. W. L. Roe vs. Texas & Pacific Railway Company.

The time within which plaintiff W. L. Roe may prepare and present bills of exceptions upon order overruling motion to remand to the State Court is extended to the 15th day of January 1914, and the said cause is kept open until said date for said purpose.

GORDON RUSSELL,
Judge of said Court.'

I agree to the above
F. H. PRENDERGAST,
Atty. for T. & P. Ry. Co."

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No. 18 Orig.

IN THE

Supreme Court of United States

IN THE MATTER OF THE APPLICATION OF W. L. ROE FOR A WRIT OF MANDAMUS AGAINST THE HON. JOHN C. RUSSELL, DISTRICT JUDGE OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

MEMORANDUM AND BRIEF FOR PETITIONER IN SUPPORT OF HIS MOTION FOR LEAVE TO FILE THE PETITION FOR MANDAMUS AND IN SUPPORT OF HIS APPLICATION FOR THE WRIT.

S. P. Jones,
Marshall, Texas,
Attorney and Counsel for Petitioner.

IN THE

Supreme Court of United States

IN THE MATTER OF THE APPLICATION OF W. L. ROE FOR A WRIT OF MANDAMUS AGAINST THE HON. J. GORDON RUSSELL, DISTRICT JUDGE OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS, AND AGAINST THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

MEMORANDUM AND BRIEF FOR PETITIONER IN SUPPORT OF HIS MOTION FOR LEAVE TO FILE THE PETITION FOR MANDAMUS AND IN SUPPORT OF HIS APPLICATION FOR THE WRIT.

To the Hon. Edward D. White, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The sole question involved here is whether a suit against a common carrier which is operated under a charter granted by an act of the Congress of the United States, which gives it the privilege to remove suits against it for more than three thousand dollars to the District Courts of the United States, can be

removed to the said courts where the cause of action is for personal injuries, based upon and given by the Act of Congress commonly known as the Employers' Liability Act adopted in 1908 as amended in 1910, which provides that "no case arising under this Act, and brought in any State Court of competent jurisdiction, shall be removed to any court of the United States."

The petition for mandamus is presented and insisted upon because the petitioner is of the opinion that the Act of Congress referred to giving him his right or cause of action herein and which deprives the Texas & Pacific Railway Company of the right to remove from the State Court to the United States courts, is legal, effective and binding upon the petitioner and the said defendant.

This is a motion for leave to file a petition for writ of mandamus directing Judge [redacted]. Gordon Russell of the Eastern District of Texas, and the District Court of the United States for the Eastern District of Texas, to remand a suit at law from said court to the District Court of Harrison County, Texas, from whence it had been removed and to desist from exercising any further jurisdiction in said suit, except the entering of an order remanding the said suit.

On the 29th day of May, 1913, petitioner filed this suit in the District Court of Harrison County, Texas, against the Texas & Pacific Railway Company, a corporation created by and under an Act of Congress,

and being an inhabitant of Dallas, Dallas County, Texas.

Petitioner's cause of action was based upon the Act of Congress and amendments thereto, commonly known as the Employers' Liability Act as adopted in 1908 and as amended in 1910. The cause of action as set forth in petitioner's original petition was substantially as follows:

That on the 15th day of January, 1913, the petitioner was in the employ of the defendant Texas & Pacific Railway Company as a freight brakeman running on a freight train from Marshall, Texas, to Sodus, Louisiana, and that as such brakeman it was necessary for him to assist in loading and unloading freight at the various stations between the two terminals.

That the said defendant, the Texas & Pacific Railway Company, was a common carrier owning and operating this said line of railroad from Marshall, Texas, into the State of Louisiana, over which the said train was being operated, and that it was engaged in commerce between the State of Texas and the State of Louisiana, at the time the plaintiff was injured, and that the plaintiff was employed by it in said commerce, and was so employed and engaged in commerce between the State of Texas and State of Louisiana at the time he received the injuries complained of.

That while assisting in unloading a freight car at Grand Cane on said line of railway in the State of Louisiana that the plaintiff was injured by a platform

or dolly-way that was furnished by the defendant Railway Company being defective and out of repair, giving way and causing him to fall and inflict upon him serious and permanent injuries from which he will never recover, all of which was caused by the negligence of the agents, servants and employees of the said Railway Company; and alleging damages in the sum of thirty thousand dollars.

In due time the Texas & Pacific Railway Company presented in the District Court of Harrison County, Texas, a petition to remove said cause from the District Court of Harrison County, Texas, to the District Court of the United States for the Eastern District of Texas. The petition for removal was based solely upon the fact that the Texas & Pacific Railway Company is a Federal corporation, and that the amount in controversy exceeds three thousand dollars.

Thereupon your petitioner, as plaintiff in said cause, filed in the said District Court of Harrison County, Texas, his objections to the removal of the said cause to the District Court of the United States for the Eastern District of Texas, because the said plaintiff's cause of action was dependent upon and arose out of the provisions of the said law commonly known as the Employers' Liability Act of Congress, which was passed in 1908 and amended in 1910. That under the provisions of said Act and the amendments thereto, that the defendant Railway Company was deprived of the privilege of removing the said cause

from the District Court of the State of Texas to the District Court of the United States.

The District Court of Harrison County, Texas, approved the bond and entered an order granting the petition for removal, and removed the cause to the District Court of the United States for the Eastern District of Texas.

Thereafter and in due time the Texas & Pacific Railway Company filed in the office of the clerk of the said District Court of the United States for the Eastern District of Texas, at Jefferson, Texas, a copy of the record in the said cause, and in due time, before any other or further proceedings were had in the said cause in the said district court, your petitioner as plaintiff filed in said court a motion to remand said cause appearing specially for the purposes of such motion only, saving and reserving any and all objections which he had to the mode, manner and method of removal papers, and expressly denying that the said District Court of the United States for the Eastern District of Texas had jurisdiction of said cause, or of your petitioner, the plaintiff, in said cause; which said motion to remand was based upon the propositions of law hereinafter more fully presented, which are to the effect that causes of action arising under the said Employers' Liability Act of Congress cannot be removed from state courts to the Federal courts.

Thereafter, the defendant, The Texas & Pacific

Railway Company, entered a demurrer to the said motion to remand, and admitted that the said cause of action set out in the plaintiff's petition was one arising under the said Act of Congress commonly known as the Employers' Liability Act, but claimed that it had the right to remove the said cause, because the suit being one against a corporation created by an Act of Congress was a suit arising under the laws of the United States, and therefore it had the right to remove the said cause from the District Court of Harrison County, Texas, to the District Court of the United States for the Eastern District of Texas, and that it was not the intention of Congress to abridge or destroy the said right of removal by the provision in said Employers' Liability Act to the effect that suits founded upon said act should not be removed from the state court to the United States courts.

Subsequently and before any other or further proceedings were had in the said cause the said motion to remand came on to be heard, same having been submitted on the verified motion to remand, and the demurrer of the Texas & Pacific Railway Company thereto; and the court after having considered the said motion, sustained the demurrer of the said Texas & Pacific Railway Company thereto, and overruled and denied the motion to remand same to the District Court of Harrison County, Texas, Hon. J. Gordon Russell sitting as judge of said court.

Thereupon your petitioner excepted to the order

overruling his motion to remand and tendered his bill of exceptions, which were duly allowed, approved and filed by the said Hon. [redacted] Gordon Russell, judge of said court, a copy of said bill of exceptions accompanying the petition for mandamus herein as Exhibit "A" thereto.

Your petitioner states in his petition for mandamus herein, that by the ordinary remedy of appeal from a final judgment of the District Court of the United States in said suit at law, it may be and probably will be several years before the question as to whether the said court should have retained jurisdiction of said cause can be considered and determined by this honorable court, and that your petitioner will be put to great expense, trouble and delay in prosecuting the said case in the District Court of the United States and in the Circuit Court of Appeals and in the Supreme Court of the United States; all of which your petitioner believes to be unnecessary by reason of the lack of jurisdiction of the District Court of the United States for the Eastern District of Texas.

Your petitioner further shows that many other cases have been removed from the state courts to the said District Court of the United States for the Eastern District of Texas in which the same question is involved, and that as this is a jurisdictional question, it is of great importance that the same be now considered and definitely and finally settled by adjudication by this honorable court.

ARGUMENT.

The Texas & Pacific Railway Company enjoys the privilege of removing all cases brought against it in state courts to the district courts of the United States, for the sole reason that it is operating a railroad under a charter authorized by an Act of the Congress of the United States, together with amendments thereto, which gives it the right to remove suits to the district courts of the United States under that subdivision of section 24, of the Federal Judicial code, giving jurisdiction in cases where the sum or value of three thousand dollars is involved, and arising under the constitution or laws of the United States.

Inasmuch as the plaintiff's suit is for more than three thousand dollars, and was instituted against such Federal corporations, it is claimed that the right of removal to the Federal court existed, and that subsequent legislation curtailing such right was not applicable to a suit against a corporation doing business under a charter derived from an Act of Congress.

It is contended by the plaintiff, petitioner herein, that inasmuch as his cause of action arose

under the Employers Liability Act of Congress of 1908 as amended in 1910, Sec. 6 of which provides that no case arising under this Act and brought in any State Court of competent jurisdiction, shall be removed to any court of the United States, which is also recognized in Section 28 of the Federal Judicial Code enacted March 3rd, 1911, where it is provided:

"Provided that no case arising under an act entitled An Act Relating to the Liability of Common Carriers by Railroads to their Employees in certain cases, approved April 22, 1908, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

The District Judge for the Eastern District of Texas declines to remand cases of this character to the State Court, holding that the Texas & Pacific Railroad Company having a right to remove the said cause on account of the said railway company being a corporation created by an act of Congress, that the provisions referred to limiting the power of removal are not applicable and that the railway company can remove these cases to the United States court.

It has been held that where the plaintiff's cause of action is one arising under the said law commonly known as the Employers Liability Act of Congress, that notwithstanding the common carrier, by reason

of diverse citizenship by reason of the suit being one arising under the laws of the United States, or for any other reason being otherwise entitled to remove a cause of action to the District Courts of the United States, is absolutely shorn and deprived of the privilege of removing the suit by the provisions of the said Employers Liability Act herein referred to.

The following cases uphold this doctrine:

Symonds vs. St. L. & S. E. Ry. Co., 192 Fed. 353; Youmans, Dist. Judge, Ark.;
Hulae vs. C. & N. W. Ry., 194 Fed. 747, Munger, Dist. Judge, Neb.;
Strauser vs. Chicago B. & Q., 193 Fed. 293, Munger, Dist. Judge;
Saick vs. Penn. R. Co., 193 Fed. 303, Chatfield, Dist. Judge, E. D. New York;
Lee vs. Toledo, St. L. & W. Ry., 193 Fed. 685, Wright, Dist. Judge, Ill. E. D.;
Ulrich vs. New York N. H. Ry., 193 Fed. 769, Hand, Dist Judge, N. Y. (S. D.); Holt & Hough, Dist. Judges, approving the conclusion reached;
Teel vs. Chesapeake & O. Ry. of Virg., 204 Fed. 918 U. S. C. C. A. 6th Circuit, Warrington, Judge.

The only time that this question has been directly before the United States Circuit Court of Appeals is in the case of *Teel vs. Chesapeake & Ohio Ry. Co.*, 204 Fed. 918, and Justice Warrington delivered the opinion of the court reviewing the cases of the various dis-

trict courts, and holding that the Employers' Liability Act positively prevented the removal of all cases brought in the state court upon which the plaintiff's cause of action was made to depend upon said Act. The only district judge holding that these cases are not removable is the district judge for the Eastern District of Texas as appears from opinion rendered in the case of *Van Grimmer vs. Texas & Pacific Railway Company*, 190 Fed. 394.

In the early case of *Symonds vs. St. L. & S. E. Ry. Co.*, 192 Fed. Rep. 353, Judge Youmans of the Western District of Arkansas fully discusses the Employers' Liability Act and its effect upon its removal of causes, and upon page 355 he says:

"The bill amending section 6 of the Employers' Liability Act, approved April 22, 1908, was considered in the Senate on March 30, 1910. As the bill left the House and reached the Senate, the clause in question read as follows:

'The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states.' Congressional Rec., Second Sess. 61st Congress, vol. 45, part IV, p. 3994.

The question of removal was fully discussed. In the court of the discussion the following amendment was presented: 'Provided, that every common carrier by railroad subject to the provisions of this act shall be deemed a citizen of every state into or through which its line of railroad shall be constructed or extend.' Id. p. 3995.'

This was criticized on the ground that it would not fully effect the purpose intended; that is, the denial

of the right of removal. It was shown that this amendment would affect only the right of removal on the ground of diverse citizenship, and would not affect the right of removal on the ground that a federal question was involved. The discussion was resumed in the Senate the next day. Senator Paynter, of Kentucky said:

'I offer an amendment which will give to the plaintiff the right to select the forum in which his case shall be tried. He can select the federal or the state court, as he may prefer, to try his case arising under the act in question.'

The amendment offered was as follows:

'And no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.'

Upon the reading of the proposed amendment, Mr. Bailey, of Texas, said:

'That, Mr. President, is entirely agreeable to me, because it takes these cases out of the operation of the removal act.' Id. 4051.

This amendment was adopted and incorporated in the bill. The House concurred on April 2, 1910, on which date this amendment was discussed. It was stated by Mr. Mann, of Illinois, that the effect of the amendment was that suits brought under the act should not be subject to removal, 'no matter what the amount or citizenship.' Mr. Parker, who had charge of the bill, added:

'No matter what the amount or citizenship. The idea was that a writ of error would issue only upon a federal question at the termination of the suit.' Id. 4158.

These discussions disclose fully the intention of Congress. The language plainly expresses that intention, and excludes any other."

In the *Ulrich vs. New York & N. H. Ry. Co.*, 193 Fed. Rep. 769, opinion by District Judge Hand, of the Southern District of New York, and in which Judges Holt and Hough concurred, District Judge Hand, among other things said, on page 771:

"An analogy exists for the interpretation in those cases in which a federal court, having one ground of jurisdiction, can dispose of the whole case though it involves other matters (*Ry. vs. Miss.*, 102 U. S. 135), as, indeed, in those in which the jurisdiction remains, though the allegations prove unsupported (*City Ry. Co. vs. City Steel Ry. Co.*, 166 U. S. 557)."

It is certain that the Congress of the United States has the power to abridge or curtail the jurisdiction of the district courts of the United States, and it occurs to me that it is very clear that the language used in section 6 of the Employers' Liability Act of 1908, amended in 1910, is capable of no other construction than it was the intention of Congress to deprive the defendant of privilege of removing such suits to the District Courts of the United States. There is certainly no ambiguity about the language used, viz.:

"The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

If there could be any doubt about the meaning of the language just quoted, it occurs to me that such doubt is entirely dispelled by an examination of the Federal Judicial Code, enacted March 3, 1911, to take effect January 1, 1912.

Subdivision 1, of sec. 24 of that code provides that the District Court of the United States shall have jurisdiction in suits at common law where the matter in controversy exceeds, exclusive of interest and cost, the sum or value of three thousand dollars and arises under the constitution or laws of the United States.

Section 28 of that Act, providing for the removal of civil suits after providing that any suit of a civil nature at law or in equity arising under the constitution or laws of the United States or treaties made or which shall be made under their authority, of which the District Court of the United States are given original jurisdiction by the said title, at the end thereof contains the following significant proviso:

"Provided, that no case arising under an act entitled, An Act Relating to the Liability of Common Carriers by Railroads to their Employees in certain cases, approved April 22, 1908, or any amendment thereto, and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

It occurs to me that it is very clear indeed that under the provisions of the foregoing clause that

the cause of action should never have been removed from the state court to the District Court of the United States, and that the plaintiff's motion to remand the same to the state court should certainly have been granted.

There is no room for a contention of ambiguity as I understand it, but if it is contended that there is room for contention that there is sufficient ambiguity about the meaning of this statute to call upon the court for a construction or interpretation thereof, I call attention to the fact that it has long been the settled policy of Congress, as fully recognized by this court, to continually and habitually curtail the jurisdiction of the District Courts of the United States.

Among the authorities calling attention to the disposition of Congress to curtail the jurisdiction of the United States courts, instead of enlarging such jurisdiction, attention is directed to the following:

Ex parte Abraham C. Wisner, 203 U. S. 449, where Chief Justice Fuller says, on page 459:

"And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdiction of the circuit courts of the United States. *Smith vs. Lyon*, 133 U. S. 315, 320, 33 L. Ed. 635, 637, 10 Sup. Ct. Rep. 303; *Re* Pennsylvania Co., 137 U. S. 451, 454, 34 L. Ed. 738, 740, 11 Sup. Ct. Rep. 141; *Fisk vs. Henarie*, 142 U. S. 459, 467, 35 L. Ed. 1079, 1082, 12 Sup. Ct. Rep. 207."

Attention is further directed to the fact that if writ of mandamus is not granted and the petitioner is not given the relief to which he believes he is entitled, but is remitted to the more tedious and cumbersome right of asserting his right in the trial of the said cause, and by an appeal thereof, that in view of the fact that he will probably recover a judgment in the said trial court from which he will not care to prosecute an appeal, but which will be appealed or writ of error sued out by the railway company, that he will be deprived of the privilege of having his case tried in the forum of his selection and as guaranteed to him by the law which gives him this right or cause of action against the defendant.

It occurs to me that the very purpose of the provision of the Employers' Liability Act referred to was to give the employee the privilege of selecting that forum where his rights and remedies would be most speedily protected and where he would be enabled to get the quickest final disposition of his cause of action. It is a part of the history of our country that the courts of the United States, and especially the Supreme Court of the United States, are far behind with the business of disposing of cases pending in said courts, and that inasmuch as the right to remove these cases from the state court to the United States court, if sustained, also gives to the Texas & Pacific Railway Company the right to carry such causes to the United States Supreme Court as they are suits arising

under the laws of the United States, it is almost equivalent to denying the employees the beneficent protection that the legislation was enacted to guarantee.

I respectfully submit that the petitioner is correct in his contention that the said cause should have never been removed from the state court to the United States court, and I further submit, that, it is proper, in fact practically necessary, in order to fully protect the petitioner's rights, that the same be so protected by a writ of mandamus being awarded directing the said judge of the District Court of the United States for the Eastern District of Texas, and the said court to desist from exercising further jurisdiction in the said cause, and directing that the said cause be remanded to the state court for proceedings in that court, consistent with the provisions of the said Employers' Liability Act, which gives to the plaintiff the cause of action upon which this said suit is based.

S. P. JONES,
Atty. for Petitioner, W. L. Roe.

In The Supreme Court of The United States

IN THE MATTER OF THE APPLICATION OF W. L. ROE FOR MANDAMUS TO COMPEL GORDON RUSSELL, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS, TO REMAND TO THE STATE COURT THE CASE

OF

W. L. ROE

VS.

THE TEXAS & PACIFIC RAILWAY COMPANY.

ANSWER OF THE TEXAS & PACIFIC RAILWAY CO.

Now comes the Texas & Pacific Railway Company and shows to the Court that it has been served by W. L. Roe, with notice that he will apply to this court on February 2, 1914, for leave to file an application for a mandamus to com-

pel respondent as United States District Judge to remand to the State Court the case of W. L. Roe vs. Texas & Pacific Railway Company.

The Texas & Pacific Railway Co. respondent deems it proper to state for the preliminary hearing, some of the reasons why the cause was not remanded to the State Court and why the writ of mandamus should not be issued. Requesting that if the court should order the application for mandamus filed that it will be set down for argument at some future day and that Judge Gordon Russell be served with notice of same.

FIRST.

Now comes the Texas & Pacific Railway Co. and shows to the Court that Gordon Russell was the District Judge of the United States Court of the Eastern District of Texas at Jefferson and in October, 1913, he overruled and denied an application of W. L. Roe to remand to the State Court his suit against the Texas & Pacific Railway Company.

SECOND.

In the motion of W. L. Roe to remand said case, it was not contended that there was any defect or informality in the removal proceeding but he sought to have the case remanded on the ground that his cause of action arose under the Employers' Liability Act of Congress passed in 1910.

THIRD.

This respondent says that in passing on said motion to remand he, the said judge, exercised the judicial discretion confided in him as United States District Judge and that discretion can not be controled by the extraordinary Writ of Mandamus from this court. Said W. L. Roe filed his suit in the District Court of Harrison County, Texas, in which he asserted his cause of action to be as follows:

> "The plaintiff shows that on the said date while the said train was stopped temporarily at Grand Cane in the State of Louisiana, for the pur-

pose of unloading and loading freight, that the defendant, its agents, servants, or employes, furnished a gang-plank, or loading board or temporary platform which consisted of planks bolted together so as to form a gang-plank, loading platform, or bridge that was used for trucking and moving freight from and to said cars of the said defendant at said station.

"The plaintiff further shows that the brakemen upon said train were required to use the said gang-plank platform, or unloading platform for the purpose of loading and unloading the freight to and from the said cars of the said train at the said station.

"That by reason of the negligence of the defendant Railway Company, its agents, servants and employes, for whose negligence it is responsible and liable, that the said gang-plank, running board, or unloading platform had become defective and out of repair and was not in a suitable condition for the purpose for which the plaintiff and other employes were required to use the same, in that a portion of the said gang-plank, running board, or unloading platform had become broken and split and detached from the remaining portions of the said gang-plank, running board, or platform, in such a manner as that the said defective portion thereof remained in position in the said gang-plank, running-board, or unloading platform until weight was placed thereon.

"The plaintiff shows that on or about the said 15th day of January, 1913, while he was performing his duties as a brakeman, and assisting in loading and unloading freight from the said train at the said station, that he started to walk upon the said gang-plank, loading platform, or running-

board, and that, not knowing the defective condition thereof and that the same was out of repair or defective, that the plaintiff stepped upon the said broken or detached piece or portion of the said gang-plank, running-board, or unloading platform and that by reason of the defective and unsafe condition thereof which was caused and brought about by the negligence of the said defendant, its agents, servants, and employes, that the plaintiff's foot and leg went through the said hole in the gang-plank, unloading platform or running-board, and caused the plaintiff to fall with great force, which tore,, bruised and injured his side and body and inflicted upon the plaintiff a severe hernia.

"The plaintiff shows that the defendant knew of the said defective condition of the said gang-plank, running-board, or unloading platform or could have known of the defective condition thereof by the exercise of ordinary care and that the plaintiff did not know of the defective condition of said gang-plank, running-board, or unloading platform and could not have known of the defective condition thereof.

"The plaintiff further shows that at the time he was injured that the defendant Texas & Pacific Railway Company, being a common carrier by railroad was engaged in commerce between Louisiana and the other several states and territories of the United States, and that the plaintiff was employed by said carrier in such commerce at the time he was injured, in that he was employed in assisting in handling and hauling a train that was being operated by the said Texas & Pacific Railway Company through the State of Louisiana and into the State of Texas, and that the said injuries resulted in whole or in part from the negli-

gence of the officers, agents, or employes of the said Texas & Pacific Railway Company and by reason of the said defective and insufficient appliances; all of which was due to the defendant's negligence in permitting the said defects in said appliances which plaintiff was required to use in the discharge of his duties as an employe of the said Company."

That the above quotation is taken from the plaintiff's petition and it devolves upon the Judge to exercise his discretion in determining whether the plaintiff at the very time of his injury was engaged in the work of carrying on transportation between the states. The allegation as set out above leaves the plaintiff in a position that he might recover on his allegation under the state law and not under the act of Congress, where if the plaintiff obtains the right of recovery under the state law, then the cause of action becomes removable as it has been often decided that the Texas & Pacific Railway Co. holds its charter under an act of Congress and has the right of removal of this case to the Federal Court by reason of that one fact. The plaintiff in his allegation has brought himself under the Employers Liability Act as it was originally enacted in 1906, which act was condemned in the case of Howard vs. Illinois Central 207 U. S. page 498, wherein the Court uses this language:

> "The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employes, without qualification or restriction as to the business in which the carriers may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce.

In the case of ex-parte Harding 219 U. S. page 370 this court after fully considering and reviewing practically all

of the authorities up to that date, felt called upon to disapprove and qualify ex-parte Wisener 203 U. S. 449, and in re Moore 209 U. S. 490, and in re Wynn 213 U. S. 448 and enforced the doctrine that the Federal trial Court could not be compelled by the mandamus to remand a case to the State Court when in the discretion of the trial court the motion to remand had been denied.

FOURTH.

The respondent further says that the question as to whether W. L. Roe at the very time he was injured was engaged in Interstate Commerce is open to contention by the Texas & Pacific Railway Company and if it desires to have the question determined whether he was so engaged at the time he was injured by the Federal Court instead of the State Court, this being a question of fact to be determined upon a hearing on the case, had the right to have the question decided in the Federal Court and therefore the Texas & Pacific Railway Company had the right of removal of the case. The said Gordon Russell is further of the opinion that Sec. 6 of the Employers' Liability Act of 1910, when it denies the right of removal of cases arising under that act, was never intended to deny to the defendant in the State Court the right to remove his case to the Federal Court if he had ground for removal other than the fact that it arose under the Employers' Liability Act of Congress and it was not the intention of Congress in passing the Employers' Liability Act of 1910 to deprive the Texas & Pacific Railway Company of its right to remove proper cases to the Federal Court on the ground that it was a Federal corporation. The said respondent shows that Gordon Russell had this matter presented to him in the case of Van Brimer vs. Texas & Pacific Railway Company in which he gave his reasons for refusing to remand, 190 Federal 394. And as he understands the situation the Federal Employers' Liability Act of 1906 being an act of Congress gave to the defendant in every case brought against it, the right to remove the case to the Federal Court if it arose under that specific act

of Congress and that the original act of 1906 caused a great mass of litigation to be carried to the Federal Court for the simple reason that it involved the construction of that act and led Congress to provide by the act of 1910 that the fact that such cases arising under that act should not be brought to the Federal Court and it was not the intention of Congress to deprive or take away the right of removal that existed by reason of other laws. Van Brimer vs. Texas & Pacific Railway Co. 190 Federal 394.

FIFTH.

This respondent further shows that the right of removal was declared to exist in Federal corporations, first in the case of Osborne vs. The Bank 9th Wheaten page 817 and re-inforced and applied to the Texas & Pacific Railway Company under Pacific Railroad cases in 115 U. S. page 1, and decided to be a valuable right which could not be taken away by the form of allegation in the case of Texas & Pacific Railway vs. Cody 166 U. S. page 606 and it is well that this is so because as the Federal government has a direct and important interest in the Texas & Pacific Railway Company as a means of transportation secured to the government by Section 19 of the charter, which provides as follows:

"That the Texas & Pacific Railroad Company shall be and it is hereby declared to be a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company, nor any law of any state or Territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard; Provided that said road shall be subject to the use of the United States for postal, military and all other government service, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the Government shall at all times have the preference in the use of the same for the purposes aforesaid."

The said respondent shows that at the time that the Employers' Liability Act of 1910 was passed said Russell was a member of Congress and a member of the committee on Interstate and Foreign Commerce which reported and recommnded its passage and he did not and does not share in the limitations of meaning placed on the act as appears in certain expressions of Senators set out in the case of Symons vs. St. Louis Southeastern Railway Company, 192 Federal page 353, and inserted in the brief of applicant, as appears from Van Brimer vs. Texas & Pacific 190 Federal 394.

We think that the statement of individual members of Congress can not be taken to limit the meaning of the words of an act. Such matters may be considered as a part of the history of the times, and the reason the law was enacted; in short to exhibit "The old law the mischief and the remedy" sought to be given as was suggested in the case of Van Brimer vs. Texas & Pacific Railway Company 190 Federal 394, and Standard Oil Co. vs. U. S. 221, U. S. 1.

SIXTH.

Another matter which may be in the judgment of the respondent properly set out is that if the case should be remanded to the state court after it has once been removed then the losing party is entirely without any redress, there being no way in which he can bring the matter up for appeal and if error is committed the losing party is without redress and on the other hand if error is committed the losing party may appeal and by this subsequent appeal get redress to the error committed.

SEVENTH.

Another matter worthy of consideration. The Texas & Pacific Railway Company has its charter from an act of Congress which charter gives it the right to remove its causes to the Federal Court, and this valuable right ought not to be held taken away by a general law not referring to the charter. The charter is a contract with the government and is entitled to the protection accorded by Dartmouth College vs. Woodword 4 Wheaten 518.

EIGHTH.

If the construction contended for by applicant is to maintain then the whole statute of removal would be subverted. If a cause arose under an act of Congress (The Employers' Liability Act) it could not be removed. If it did not arise under an act of Congress it could be removed.

If W. L. Roe should sue the Texas & Pacific Railway Co. and allege it was a Texas corporation, and the Texas & Pacific should assert it was not a Texas corporation but a Federal corporation and seek removal, that question would be tried in Federal Court. Texas & Pacific vs. Cody 166 U. S. 606.

If W. L. Roe should file suit in State Court and allege that the defendant was a resident of the State and defendant should allege he was a non-resident and seek to remove on that ground then the case should be removed and the question of residence tried in Federal Court.

If W. L. Roe should sue a non-resident and defendant at any time before trial should seek to remove on the ground of prejudice or local influence, the Federal Court would try the question of prejudice and local influence.

So we say the same rule applies if he sues under the Employers' Liability Act, if defendant has other ground for removal, he may have the question of whether the cause arises under the act tried in Federal Court. But if defendant had no other ground for removal he would have to try the whole case in the State Court.

The Employers' Liability Act does not deprive the Federal Court of jurisdiction but only gives plaintiff choice of forums so far as that act is concerned, and no farther.

The matters referred to above are not stated as absolute rules of law on the points discussed, but as pertinent suggestions showing that the matter of remanding the cause

is one of discretion that should not be controlled by mandamus.

Wherefore it prays that leave to file be denied.

F. H. PRENDERGAST,
Attorney for Texas & Pacific Railway Co.

F. H. Prendergast on oath says he is the attorney for the Texas & Pacific Railway Company, and the statement above, taken from plaintiff's petition is a correct copy of the charging part of the petition.

Sworn to and subscribed by F. H. Prendergast before me the undersigned authority, this January.....1914.

No. 13 Orig.

In The United States Supreme Court

APPLICATION FOR A MANDAMUS.

AGAINST THE DISTRICT JUDGE.

W. L. ROE ..... RELATOR

vs.

GORDON RUSSELL ..... RESPONDENT

And the Texas & Pacific Railway Co.

BRIEF FOR THE TEXAS & PACIFIC RAILWAY CO. IN OPPOSITION TO GRANTING THE WRIT.

By F. H. PRENDERGAST,
Marshall, Texas.

THE ALTERNATIVE WRIT FOR MANDAMUS HAS BEEN ISSUED AND HEARING SET FOR APRIL 6, 1914. THE TEXAS & PACIFIC RAILWAY CO. FILES THIS BRIEF IN SUPPORT OF THE ANSWER TO SAID ALTERNATIVE WRIT FILED BY SAID GORDON RUSSELL, DISTRICT JUDGE.

In The United States Supreme Court

APPLICATION FOR A MANDAMUS.

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W. L. Roe filed suit in the District Court of Harrison County, Texas, on May 29, 1913, against the Texas & Pacific Railway Company for damages resulting from personal

injuries for the sum of Thirty Thousand ($30,000.00) Dollars. In due time the Texas & Pacific Railway Company filed an application and bond and removed the case to the United States District Court on the ground that the Texas & Pacific Railway Company was a corporation chartered by Congress, the cause was regularly removed and the record filed in the United States District Court for the Eastern District of Texas at Jefferson.

W. L. Roe made a motion to remand the cause to the State Court, because the suit arose under the act of Congress known as the Employers Liability Act, and that it being such a suit under the amendment to said act of 1910, the cause could not be removed.

The Court heard the application to remand and refused it, and W. L. Roe has applied now for a writ of mandamus to compel the District Judge to remand the cause to the State Court. The alternative writ has been issued.

FIRST.

A MANDAMUS WILL NOT ISSUE FROM THE SUPREME COURT TO COMPEL THE DISTRICT JUDGE TO REMAND A CAUSE TO THE STATE COURT, WHEN THE JUDGE HAS HEARD THE MOTION TO REMAND AND DENIED IT, BECAUSE THE ACTION OF THE COURT ON THE MOTION TO REMAND, INVOLVED THE EXERCISE OF JUDICIAL DISCRETION.

Plaintiff alleged that he was employed by the Texas & Pacific Railway Company, as a brakeman on a freight train at Grand Cane, Louisiana, a station on said Railway in the State of Louisiana, that while using a gang plank which reached from the car door to the station platform, he was injured by the plank giving way. He further alleges as follows:

"Plaintiff further shows that at the time he was injured that the defendant Texas & Pacific Railway Company being

a common carrier by railroad was engaged in commerce between Louisiana and the other several states and territories of the United States, and that the plaintiff was employed by said carrier in such commerce at the time he was injured, in that he was employed in assisting and handling and hauling a train that was being operated by the said Texas & Pacific Railway Company through the State of Louisiana and into the State of Texas."

He further alleges the employes of the Texas & Pacific Railway Company were negligent in furnishing the appliance.

It will be observed from these allegations that the plaintiff alleges that the defendant was engaged in commerce between the states and that the plaintiff was employed by said carrier in said commerce at the time he was injured, that he was employed in assisting in handling and hauling a train that was being operated by the defendant in Louisiana and Texas. He does not specifically allege that the labor he was performing at the very time he was injured was in furtherance of the commerce between the states, and it would be seriously doubtful whether in fact he was so engaged in the particular work he was doing at the time he received the injuries. It appears that he was unloading freight from a car, which was the part of the train used in interstate commerce, but it is not shown that the freight he was unloading had come from beyond the limits of Louisiana. From aught that appears, it may have come from some station in Louisiana on the line of the defendant Railway. At any rate it is open to the Railway Company to contend under the evidence that would be introduced, that he was not engaged in interstate commerce at the very moment he was injured. These questions are all mixed questions of law and fact, which call for the exercise of judicial discretion on the part of the District Judge hearing the motion to remand, and there is no more reason for controlling his judgment in this regard than there would be if he were to rule on the demurred interposed by the defendant.

Suppose the defendant should interpose a demurrer that

the allegations were not sufficient to show that the plaintiff was injured under circumstances that would bring him under the act of Congress known as the Employers Liability Act, and the Court had sustained that demurrer, this Court would surely not undertake to control the discretion of the District Judge in that regard, or suppose that the defendant should interpose a demurrer on the merits of the case and the Court in ruling on that demurrer would pass on pure questions of law, yet it is clear that this Court would not undertake to control his action by a writ of mandamus.

This Court in re Harding 219 U. S. 363, reviewed the pertinent authorities on the application for a mandamus and concluded that the writ would not issue commanding the District Judge to remand the case, unless there was some extraordinary circumstance and danger of rerreparable injury if the matter was delayed.

We are not able to perceive in the circumstances of this case any reason why the decision in the Harding case should not determine the matter against the issuance of the writ.

The mere fact that it is necessary in the ordinary procedure to await until there is final judgment before you can have the question of remanding reviewed, is not sufficient in our judgment to call for an issuance of the mandamus.

It must be remembered that it is not a case arising under the safety appliance act of Congress, and the case must be determined purely and simply under the law of the State of Louisiana where the accident occurred, in determining whether the defendant was negligent in furnishing the gang plank, and whether plaintiff was negligent in what he did on the occasion.

The Employers Liability Act was passed by Congress in 1908 and amended in 1910, the amendment pertinent to the present inquiry being this. After stating that the jurisdiction of the State and Fedal Court was concurrent, "And no case arising under this act and brought in any State Court of competent jurisdiction shall be removed to any court of the United States."

The same language is used at the end of Section 28 of the

Judicial Code but is introduced under a **proviso.** Now the office of a Proviso is to except something out of the enacting clause of a statute, to limit the generality of the statute to the extent of the things in the Proviso.

This seems to be a very general rule stated in many different forms to the same purport.

Minis vs. U. S., 15 Pet. 423.

U. S. vs. Dickson, 15 Pet. 141.

1 Kent 462, 463, and note.

A number of Districts Courts have held the Proviso in Section 28 of the Judicial Code, mandatory, and have remanded cases arising under the Employers Liability Act.

McChesney vs. I. C. R. R., 197 Fed. Rep. 87.

And cases cited. One of the Judges held that prior to the enactment of the Judicial Code, he would have been disposed to agree with Judge Russell in Van Brimmer vs. T. & P. 190 Fed.

We think the argument is the other way, prior to the enactment of the Judicial Code, the amendment of 1910 to the Employers Liability Act was the last expression of Legislative will and might be held to be all controlling, but in the Judicial Code the act of 1910 becomes only a proviso and limits the universality of the removal statute.

To paraphrase Section 28, of the Judicial Code, we have this. The defendant may remove any suit arising under the laws of the United States, except the Employers Liability Act, that act does not give the right of removal, although it was an act of Congress. We have a case that arises under that act and another act to-wit: The Charter of the Texas & Pacific Railway Company. Shall the denial by Congress of the right to remove under one of these statutes by express provision, be held to deny it by implication under the oath?

This would not be in accordance with the general rules for ordinarily where we have a case with two questions in it, of one the Federal Courts had jurisdiction and of the other

it had not, the right of removal exists in all such cases. If it were not for the proviso in the 28th section of the Judicial Code then all cases arising under the Employers' Liability Act could be removed because they arose under that act of Congress.

When the amendment of 1910 was passed it was necessary only to deny removal of causes brought under that act leaving the other removal statutes unimpaired, but when the removal statutes were enacted in the Judicial Code, it become proper to insert the proviso in order to save the Employers Liability Act from being included in the general provisions of the Removal section, but leaves the general act to grant the same right of removal it formerly did.

Before the amendment of 1910 the Employers Liability Act by implication meant the same as if this clause had been added, "And causes arising under this act may be removed because they arise under this act," then the amendment in effect provides that the fact that causes arise under this act shall not be sufficient to give the right of removal. What was granted before by clear implication is now negatived by expressed provision.

If the amendment of 1910 taking away the right to remove a suit under Employers Liability Act is valid to the extent claimed by relator, then Congress has vested the Judicial power of the United States in the State Courts, and taken so much of the judicial power away from the Federal Courts except on the consent of the injured employe, if that can be done then Congress can make the jurisdiction of the State Court exclusive, then the conclusion is inevitable that no review can be had on writ of error to the highest court of the State, because having decided that the right to remove under other statutes is taken away and exclusive jurisdiction having been given to the State Courts under the act of 1910, there would be no basis for contending that a decision of the State Court was against any right specially set up and relied on in the case, whatever ruling the state court made in administering the Employers Liability Act would

be made in matters especially committed to those courts, and therefore final.

If there can be no removal before judgment, then there can be none after judgment for the statute makes no difference and places no limitation nor qualification on the prohibition. A removal is obtained before judgment by petition and bond and after judgment by writ of error. These two methods are treated of as being granted under the same head in the constitution by Judge Storey in Martin vs. Hunter, 1 Pet. 347, and by his system of deductive reasoning if one is taken away by a general statute with no saving clause, the other falls with it, and such is the logic of the situation, if the right and jurisdiction to hear the original trial is forbidden, why grant the jurisdiction to review the judgment rendered by a court that has at plaintiff's request exclusive jurisdiction if the plaintiff demands, why demand the power to hear a case on the law and deny jurisdiction to hear the facts. Section 237 of the Judicial Code provides for a review of final judgment in the State Court by the Supreme Court of the United States. And in the last sentence in that section speaks of it as being **"removed"** by the writ of error, yet this removal could not be had if we give the proviso to section 28 of the code of the universal application for which relator contends. Let's hesitate and then refuse to take the first step towards establishing such a result.

Why was this favoritism shown to the plaintiff in suits under this law? Was it because the Federal Government feared or suspected that its own Courts would not do full justice to the plaintiff, or was it because in the Federal Courts the juries did not come from the vicinage as in the State Court, and less liable to be partial toward the plaintiff or was it because the State Courts would be more likely to administer the law favorably to the plaintiff. There is no intimation that it was on account of the increased expense in the Federal Court? If that were the reason the way is open to Congress to reduce the expense of its own Courts. It would be a strange doctrine to announce that the Congress

had granted new and important rights to the citizen, but had to call on the states to supply the judicial machinery to make those rights effective because it would cost the Federal Government and the litigant too much to obtain such rights in the Federal Courts.

A writ of error would be granted to the Supreme Court of a state in these cases prior to the amendment of 1910.

North Carolina R. R. vs. Zachary U. S. Sup. Court Feb. 2, 1914, but the language of the proviso is that **"no case arising under"** the act shall be removed to **"any Court** of the United States," so it seems necessary to limit the application of the broad language of the act or else objectionable results will follow.

SECOND.

A MANDAMUS WILL NOT ISSUE TO CONTROL THE DISTRICT JUDGE'S DECISION OF A CASE WHEN THE QUESTION SOUGHT TO BE DETERMINED BY THE MANDAMUS PROCEEDINGS MAY NEVER ACTUALLY ARISE IN THE CASE FOR DECISION.

The amendment of 1910 to the Employers Liability Act gives concurrent jurisdiction to the State and Federal Courts, therefore if the District Court proceeds to try this cause, its Judgment would be binding on the party, and if the final judgment should be in favor of defendant the plaintiff having obtained the trial on the merits, may be willing and desire to end the litigation, and if judgment on final hearing is rendered for the plaintiff, he will in all probability be entirely satisfied with the recovery he has obtained and not seek to set aside the judgment, and I feel confident that in view of the facts, that the Federal District Court had jurisdiction of the cause and the party, and in view of the fact that the plaintiff acquiesced in the jurisdiction that has been sought by the defendant by the removal proceedings, the defendant would be estopped from complaining of a want of jurisdiction, and hence we say in all probability

if the cause goes to trial on its merits, the question of whether the removal proceedings were legal would be no further litigated in the case, and therefore the matter should not be anticipated and decided on an application for a mandamus.

Indeed Relator on page 16 of his brief says, "In view of the fact that he (relator) will probably recover a judgment in the said trial court from which he will not care to prosecute an appeal, but which will be appealed or writ of error sued out by the Railway Company that he will be deprived of the privilege of having his case tried in the forum of his selection."

It occurs to the writer that if he expects to be so far satisfied with the judgment he will recover, as not to appeal, then no very serious wrong has been done to him. We feel confident that this Court will not issue a mandamus merely to permit relator to select the forum for his litigation when no harm has been done to him by the forum provided for other causes.

Congress has provided for the removal of causes, and this is a valuable right in most cases, and relator insists on such a construction of the amendment of 1910 as that the right of removal will be taken away not only as to the construction and application of that act but as to the enforcement of any other right the defendant may have whether it arises under the common law, or Act of Congress or whether it was sought to get away from local prejudice.

It may be all right for Congress to say to the Railroad, you must pay your servant although he was injured by a fellow servant. You must pay your servant, if you were negligent, even though the injured servant were negligent. And he does not assume the risk of a known defect. But this law is claimed to go further and say to the railroad, we have laid down the above rules for your liability, and we forbid the Federal Courts to determine whether these facts exist unless the plaintiff is pleased to select that forum, for we know he will select the Federal forum only when the particular forum is favorable to him.

THIRD.

IF THE COURT SHOULD HOLD THAT IT WILL DECIDE THE QUESTION of the removability of this cause on mandamus, then we make the following points against the motion to remand.

WHEN THE EMPLOYERS LIABILITY ACT WAS FIRST PASSED BY CONGRESS, IT BEING AN ACT OF CONGRESS, GAVE THE DEFENDANT THE RIGHT TO REMOVE TO THE FEDERAL COURT FROM SUITS THAT WERE BROUGHT THEREUNDER, and consequently there was a flood of litigation brought into the Federal Court by reason of that fact. The plaintiff in the first instance could seek the Federal Court under the old law and the defendant could seek a removal of the cause from the State Court on the ground that it involved a construction of the Act of Congress, to-wit: The Employers Liability Act, and Congress in the amendment of 1910 was seeking to prevent this flood of litigation and the proviso means THAT WHILE ORDINARILY A CAUSE OF ACTION ARISING UNDER AN ACT OF CONGRESS MAY BE REMOVED BY THE DEFENDANT, YET THAT RULE PERMITTING REMOVAL WILL NOT APPLY TO THIS ACT OF CONGRESS, and if the case is removed, the removed defendant must have some other ground on which to base his right to a removal. This is a view taken of the case by Judge Gordon Russell, in the case of Van Brimmer vs. T. & P., 190 Fed. 394.

In the Van Brimmer case 190 Fed. 398, Judge Russell in declining to remand that case, rendered an opinion and gave his view of the intention of Congress in passing the amendment and stated that it was to prevent a removal of a cause for the sole reason that it arose under that act of Congress and was not intended to take from a litigant the right to remove his cause if that right arose from some other matter

in the cause, and it is worthy of mention that Judge Russell was a member of Congress and of the committee that reported to Congress the amendment of 1910.

If we should give to the amendment of 1910, the Employers Liability Act, the meaning contended for by the relator, we should subvert the entire removal statutes and the removal would have to be denied where the suit arose under the Employers Liability Act, although it involved the construction of other Federal statutes, or was a suit by the resident of a state against the non-resident, or was a suit against a non-resident and the non-resident should apply for removal under the prejudice and local influence clause of the statute and would evidently lead to consequences not contemplated by Congress when they passed the amendment of 1910. I take it that it may well be assumed or taken for granted that the injured employe will always sue in the local State Courts whenever said Courts, from state pride, local prejudice or local influence would favor his side of the controversy. In all of the former laws it has been sought to get a trial of the case away from said local influence or local prejudice whenever it is shown to exist against the defendant in the cause, but under the construction now contended for Congress is being placed in the position of saying to the employes: We give you a right to recover where you did not have it before, you may go to the local courts where prejudice is strong in your favor and we will compel the defendant in **your** case to try it there even though prejudice is shown to actually exist, or if you sue a non-resident we will compel the defendant to try **your** case there where prejudice is presumed to exist or if your suit involves some Federal question you still may go into the State Court in any state from Maine to Georgia and keep **your** litigation there no matter how diverse the rulings of the State Courts may be as to the construction of these Federal laws so long as you are satisfied. Then we will observe that the uniformity of decisions on Federal questions, so much desired and sought after heretofore, shall have no effect on the rights of interstate commerce employes.

A construction that would lead to such results should be avoided unless we are impelled thereto by the plainest language of the law itself.

"This is not all. A motive of another kind, perfectly compatible with the most severe respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the Constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute or treaty of the United States, or even the Constitution itself. If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the Constitution of the United States, would be different in different states, and might perhaps never have precisely the same construction, obligation or efficacy in any two states. The public mischiefs that would attend such a state of things would be truly deplorable, and it can not be believed that they could have escaped the enlightened convention which formed the Constitution." (Martin vs. Hunter, 1 Wheat 347).

FOURTH.

THE AMENDMENT TO THE EMPLOYERS LIABILITY ACT OF 1910, FORBIDDING REMOVAL TO THE FEDERAL COURT FOR CAUSES ARISING UNDER THAT ACT IS CONTRARY TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DEPRIVES THE DEFENDANT IN SAID SUITS OF THE EQUAL PROTECTION OF THE LAW AND DEPRIVES THEM OF THEIR PRIVILEGES AND IMMUNITIES WITHOUT DUE PROCESS OF LAW.

We admit that Congress under the second Employers Liability case, 223 U. S. p. 1, may favor employes of railroads as to their right of recovery, their favoritism being based on the dangers of the employment in which they are

engaged, but we do not admit that such employe may be favored in the tribunal furnished to try his case.

Under the old law Congress afforded a litigant an avenue of escape from local prejudice, where it is shown to exist at any time before the trial, and afforded him a right to escape the local prejudice on the presumption that it existed, if he applied for an order removing his case in due season, and this is the law now as to all litigants except an employe of an interstate railroad who sues in the State Court. But under the new law, the amendment of 1910 Employers Liability Act, the defendant in such a suit must stand a trial in the local tribunal selected by his adversary perhaps for the very reason that there existed local prejudice in his favor.

The equal protection of the law may be denied as readily by granting favors to one as by withholding rights from the other.

A servant of an interstate carrier is injured, he files suit in the local State Courts, if there is no local prejudice and no local sentiment against the defendant he, the defendant, will perhaps try the case there, but if he has some reason to claim the privilege granted to him in ordinary cases to remove the case, alleging grounds that would be all sufficient in ordinary cases, he is denied the right, and why is this done? Simply on account of the personality of the plaintiff. The motion to remove would be held sufficient against any plaintiff except the injured servant of a railroad engaged in interstate commerce.

If there is any one principle that pervades our government that has received universal assent and commendation, it is the principle of equality before the law, and if an Act of Congress should seemingly violate this principle on first appearance, it should be so construed and limited in its application as to make it harmonize with this universal principle.

It will be admitted that the judicial power prescribed by the Constitution of the United States extends to the matters involved in the case now before the Court. It extends to it, first, because the Texas & Pacific Railway Company

being a Federal Corporation had a right to apply to the Federal Court, because their rights arise under the constitution and laws of the United States and so held in the Pacific Railway removed case 115 U. S. p. 1, and the Texas & Pacific vs. Cody, 166 U. S., 606.

In the case of Martin vs. Hunters, lessees, 1 Wheaton 330, that being a case for a writ of error from the highest Courts of Virginia under the old judiciary act wherein the right of the Supreme Court to take jurisdiction under twenty-five section was denied and Mr. Justice Storey made some pertinent remarks as follows:

First to show that the whole judicial power of the U. S. must be vested in some court created by Congress.

"If this is the duty of Congress to vest the judicial power of the United States, it is the duty to vest the whole judicial power. The language if imperative as to one part, it is imperative as to all. If it were otherwise this anomaly would exist that Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the constitution and thereby defeat the jurisdiction as to all, for the constitution has not singled out any class on which Congress are bound to act in preference to others."

"Congress can not vest any portion of the judicial power of the United States except in courts ordained and established by itself."

"There is vast weight in the argument which has been urged that the constitution is imperative on Congress to vest all the judicial power of the United States in the shape of original jurisdiction in the Supreme and inferior Courts created under its own authority."

"There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their

rights, or assert their privileges before the same forum. Yet if the construction contended for be correct, it will follow that as the plaintiff may always elect the State Court the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can in no respect be considered as giving equal right. To obviate this difficulty, we are referred to the power which it is admitted Congress possess to remove suits from State Courts to the National Courts, and this forms the second ground upon which the argument we are considering has been attempted to be sustained."

The rule that permits Congress to legislate for certain classes, has for its foundation a difference which distinguishes the class regulated from those not regulated. The classification can not be arbitrarily made. (G. C. & D. Ry. vs. Ellis, 165 U. S. 158). (Second Employers Liability Cases 223 U. S. 1).

No person has a vested right in defenses and immunities merely because they existed under the common law, the very object of all legislation is to change and remold these rights and immunities, to conform to the supposed demands of modern commerce and enterprise. These considerations have justified those partial laws in favor of certain employes in dangerous vocations, some laws give the new right to all railroad employes, some confine it to trainmen. All these are Legislative questions in the main.

The power under this rule was exercised in the Employers Liability Law passed by Congress in 1908 and we say the power was there exhausted, and the further favor granted to the class by the act of 1910 limiting the jurisdiction and authority of the United States District Courts in an effort to favor employes of railroads engaged in interstate commerce is void, because the favor granted is not based on any valid distinction that bears any relation to the character of regulation imposed.

If the act of Congress had given a new right to the employe as the act of 1908 did, and then as an act of precaution, based on the fear that the State Court would not grant

full relief, had given the Federal Courts exclusive jurisdiction of such causes there could not have been much controversy as to the propriety of such a law, but to give the right and deny to its own courts the right to grant the relief is an anomaly.

There is a judicial power of the United States and the Constitution extends that power to controversies between citizens of different states. I do not believe that an act of Congress that provided for removals from State Courts generally, but that if the plaintiff preferred the State Court then the defendant could not remove the case, would be valid.

I realize that the right of removal is purely a right to be controlled by Congress, but the judicial power of the United States, extends to controversies between citizens of different states, and such power having been provided for and regulated by Congress can not be annulled or denied at pleasure by a plaintiff nor will an act of Congress which provides for a plaintiff exercising such a power be held to be a valid exercise of Legislative power. Under the old law whenever the Federal Court had jurisdiction that Court tried the case unless both parties were willing to try it in the State Court. But now under the doctrine contended for the Federal Court admittedly has jurisdiction of the subject matter and of the parties, but relator says the Court can not hear the particular case because he does not consent to it.

Under the construction insisted on Congress regulates commerce between the states and a part of this regulation is a discrimination against the carrier of said commerce as to its rights before the law, and withholds from such carrier valuable rights granted to ordinary persons.

FIFTH.

The Texas & Pacific Railway Company having a Congressional charter and having a right to remove under its charter can not be deprived of that right by a general law not referring to it.

The Texas & Pacific Railway Company obtains its right to remove its causes to the Federal Court by virtue of its Federal Charter and no one doubts it being a valuable right.

This charter is a special law and the provisions of the charter should not be held to be amended or repealed by any general expression in any general law, where the charter is not referred to. It is clear that Congress did not have in mind the changing of the charter rights to the Texas & Pacific Railway Company, when it passed the amendment to the Employers Liability Act in 1910. There have been several bills introduced in Congress to take the right of removal from Federal corporations, these having the direct object in view have failed to pass.

We pray that the application for the writ of mandamus be rejected.

F. H. PRENDERGAST,
Marshall, Texas.
Attorney for Texas & Pacific Railway Co.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 13, Original.

EX PARTE: IN THE MATTER OF W. L. ROE,
PETITIONER.

RETURN TO RULE TO SHOW CAUSE.

To the Honorable the Supreme Court:

Comes now Gordon Russell, district judge of the United States for the Eastern District of Texas, and makes answer to the rule granted by this honorable court on the 2d day of March, 1914, to show cause why a mandamus shall not be awarded herein, as follows:

That in the event this honorable court shall determine that the case presented by the petitioner is one in which the extraordinary writ prayed for should be granted, then this respondent respectfully informs this honorable court that the motion to remand the case of W. L. Roe *vs.* The Texas & Pacific Railway Company from the United States District Court for the Eastern District of Texas

to the State court, to wit, the District Court of the State of Texas for the County of Harrison, was denied by this respondent, for the reason that this respondent believed that the said case had been properly removed from the State court to the United States court aforesaid.

The questions of law arising on the motion to remand in the case aforesaid, of Roe *vs.* Railway, had been frequently presented for decision to this respondent in similar cases in which the Texas & Pacific Railway Company was a party.

On October 2, 1911, this respondent decided the case of Van Brimmer *vs.* Texas & Pacific Railway Company, in an opinion reported in 190 Fed., 394, and the reasons there given are respectfully referred to as the reasons which controlled the decision of the motion to remand in the case at bar.

All of which is respectfully submitted.

GORDON RUSSELL,
United States District Judge for the
Eastern District of Texas.

[Endorsed:] In the Supreme Court of the United States. No. 13, original. October term, 1913. In the matter of W. L. Roe, petitioner.

[Endorsed:] Supreme Court, U. S., October term, 1913. Term No. 13, original. *Ex parte:* In the matter of W. L. Roe, petitioner. Return to rule to show cause. Filed March 30, 1914.

No. 13 Orig.

In The United States Supreme Court

W. L. ROE ..... RELATOR

VS.

JUDGE GORDON RUSSELL.....RESPONDENT

And Texas & Pacific Railway Company.

SUPPLEMENTAL ARGUMENT OF THE RESPONDENT ON BEHALF OF THE TEXAS & PACIFIC RAILWAY COMPANY.

By F. H. PRENDERGAST,
Marshall, Texas.

In The United States Supreme Court

W. L. ROE ..... RELATOR

VS.

JUDGE GORDON RUSSELL.....RESPONDENT

And Texas & Pacific Railway Company.

SUPPLEMENTAL ARGUMENT OF THE RESPONDENT ON BEHALF OF THE TEXAS & PACIFIC RAILWAY COMPANY.

By F. H. PRENDERGAST,
Marshall, Texas.

It will be perhaps, not inappropriate to refer briefly to some matters that are involved in this litigation. First, in the case of Ex Parte Hardin, 219 U. S. 368, there was a suit filed in the State Court of Illinois by Hardin, a citizen of California against certain corporations of New Jersey. The cause was removed and the lower Federal Court refused to remand and Hardin applied to this Court for the writ of mandamus to compel remanding of the cause. The Su-

preme Court after reviewing a great many authorities held that the District Judge could not be controlled by the writ of mandamus.

Second.

With reference to the right of the Federal corporations to seek the Federal Courts with its litegation, there have been various contentions made running over nearly one hundred years. In the case of Osborn vs. Bank, 9 Wheaton 817. It was held that a bank chartered by Congress had a right to sue in the Federal Court on the ground that its very being was created by Congress and therefore its right to litigate arose under the act of its creation. This decision has been a land mark for all subsequent rulings. The next time the matter come before the U. S. Supreme Court was in the Pacific Railroad removel causes 115 U. S. 13, and this respondent, The Texas & Pacific Railway Company was one of the plaintiff's in error in those causes.

Mr. Justice Bradley says:

"An examination of those acts of Congress shows that the corporations now before us not only derive their existence, but their powers, their functions, their duties and a large portion of their resources from those acts and by virtue thereof sustain important relations to the government of the United States."

In this connection it is proper to refer to section 19 of the Texas & Pacific Charter, which provides that the Texas & Pacific Railway Co. is a military and post road and is compelled to serve the United States for reasonable rates and to give the government preference over ordinary customers. And it further provides that it should do this notwithstanding adverse state action .

The question next came before the Court in the case of Texas & Pacific vs. Cox 145, U. S. 603. The suit was originally against Brown & Sheldon, Receiver of the Texas & Pacific and afterwards the Railway Company made it a dedefendant after the receiver had been discharged, this re-

ceiver had been appointed by the Federal Court and held that the Federal Court had jurisdiction .

The question next comes before the Court in the case of Texas & Pacific Railway Co. vs. Cody 166 U. S. 606. In this case the question arose in a suit for damages against the Texas & Pacific Railway Co. in the State Court, and the cause was removed to the Federal Court, but it was contended that the cause was improperly removed by reason of the rule established in the case of Tennessee vs. Union & Planters Bank 152, U. S. 454. That rule being that a cause could not be removed from the State Court on the ground that it involved a Federal question unless the Federal question appeared in the plaintiff's own statement of his cause of action.

This Court held through Chief Justice Fuller, that the plaintiff could not deprive the defendant of his legal right to seek the Federal Court by any false or untrue allegations in the plaintiff's petition and held that the cause could be removed although the fact of the Railway having a Federal Charter did not appear in the plaintiff's statement of his cause of action.

Next, is the matter of Dunn 212 U. S. 383, this was a suit in the State Court of Texas vs. the Texas & Pacific Railway Co. and joined other defendants being servants of the Railway Company, alleging that they were also negligent in causing the damages. The cause was removed, and Dunn sought this Court to compel the Federal Circuit Court to remand the cause. This Court held that a suit against the Texas & Pacific involved a Federal question, and the mere fact that others were joined with the Railway Company, would not prevent the Railway Company removing the cause.

Next, the application of J. A. Jones for a mandamus to this Court 212, U. S. 561, to compel the U. S. Circuit Court to remand a cause against the Texas & Pacific Railway Co. because it was not brought in the District of the defendant's residence; this Court declined to permit the application to be filed.

The next case was the Van Brimmer vs. Texas & Pacific Railway Co., suit brought in the State Court and removed to the Federal Court, and on motion to remand, Judge Gordon Russell refused the motion. 190 Fed. Rep. 394. In this case the same questions arose that arise in the W. L. Roe case now under consideration, Judge Russell held that the amendment to the Employers Liability Act of 1910, which denies the right of removal, was only intended to deny that right when the right of removal was sought alone on the ground that it involved a construction of the Employers Liability Act of Congress. Since that time a number of Federal district courts have declined to follow Judge Russell's ruling, and have remanded causes, which arose under the Employers Liability Act. Several of these cases are cited. McChesney vs. I. C. R. R. 197 Fed. 87.

Third .

With reference to the validity of the Act of Congress forbidding the removal of causes if it should be given a construction contended for by relator, we have this to say.

When the Federal Constitution was first submitted to the public for adoption Alexander Hamilton, in No. LXXX of the Federalist, after stating that the Judicial Authority of the Union ought to extend to all those cases which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation, proceeds as follows:

"If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number.

"The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is hydra in government, from which nothing but contradiction and confusion can proceed.

"And if it be a just principle, that every government

ought to possess the means of executing its own provisions, by its own authority, it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in all cases in which one state or its citizens are opposed to another state or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal, which having no local attachments, will be likely to be impartial between different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded."

Judge Storey, in the case of Martin vs. Hunter's heirs, First Wheat 347, about 824, referred to it as being a very serious objection to any law of Congress to have it interpreted by the Courts of the various states, using this language:

"If there were no revising authority to control this jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties and the Constitution of the United States would be different in different states, and might perhaps never have precisely the same construction, obligation or efficacy in any two states. The public mischiefs that would attend such a state of things would be truly deplorable, and it can not be believed that they could have escaped the enlightened convention which formed the Constitution."

Judge Storey also referred to the impropriety if not injustice of allowing the plaintiff alone to say whether the Federal Courts should adjudicate the demand he asserts.

Take first a case of diverse citizenship. Perhaps no question will arise as to the construction or application of any Federal law yet the Constitution thought it wise and proper to give the non-resident citizen the right to have the Federal Court determine his rights against a resident; true the law gives the resident plaintiff the right to go into the

Federal Courts in the first instance, but this was not because of any consideration to him but it was in deference to the right and the supposed desire of the non-resident defendant to have his rights adjudicated in the Federal Courts.

Take the case of A, a resident of one state, has a controversy with B, a resident of another state. The judicial power is extended by the Constitution to that controversy, and the general statutes as to removal of causes extend to that controversy, but my opponent says that while that is true, as a general rule it has no application to those controversies that arise between citizens of different states if it also arises under the act of Congress known as the Employers Liability Act. I inquire why does it not apply to those cases, is there any reason for excluding the non-resident in these cases, from the right he has in other cases? The reply can only be that there is no reason except that the employe objects to the non-resident having such a right and insists on his desire, limiting the rights of the non-resident, and controlling its exercise. Can Congress grant jurisdiction to the Federal Court and then provide that such jurisdiction may be taken away by one of the litigants arbitrarily? Full authority is given to the Federal Courts to try causes arising under the Employers Liability Act if the employe so desires, but no authority to try them if the employe objects or does not consent.

The non-resident must even submit to have his case tried in a Court where he can not obtain a fair and impartial trial, or where he can not obtain justice, because of the prejudice and local influence in favor of his opponent, unless his opponent voluntarily takes the case to some court where there is no prejudice. This Court should not proceed upon the supposition that litigants will proceed upon any such high ground. Take a case that arises under some other Federal statute as well as the Employers Liability Act. Full jurisdiction is given to the Federal Court to decide it on original petition or by removal, yet relator asserts that although the suit involves a construction of the act of Congress known

as the Employers Liability Act, and although it arises under some other Federal law and the involution of the other Federal law would be sufficient ordinarily to give the defendant a right of removal, yet the proviso to the removal section of the Judicial Code, acts as an inhibition on the Federal Court granting the relief which would otherwise be granted.

The right to go into the Federal Court is something more substantial than merely to have this Court review the law as it may be determined by the highest State Court, even if that right should be left in tact. Sometimes there may be a real dispute as to whether the Federal law applies, a conflict of evidence. In such cases the litigant seeking the Federal Court, and if he can not remove the cause, he can not have the facts decided by that Court .

We do not find it necessary to decide whether the proviso to the removal section of the Judicial Code is void in toto, because the exigencies of this case do not require that we go to that extent, and then too, it may be held that when Congress gives or creates a cause of action where none existed before that it being an act of grace, may be coupled with such limitations and special provisions, and with such qualifications as the grantor may desire to impose, but even then care must be taken not to abridge or take away the existing rights of others. Congress may impose a liability on Interstate Carriers by rail, not imposed on others, but that is quite different from taking from such carriers the protection against unjust judgments that is secured to all other litigants. Suppose we had a state law providing for a change of venue on account of prejudice, in all cases except suits by Railroad employers, and in those cases venue could not be changed on account of prejudice unless the employe asked for it, such a law passed by the state would be void because not granting the EQUAL PROTECTION OF THE LAW, would it be depriving the carrier of property WITHOUT DUE PROCESS OF LAW?

We do go far enough to assert that the amendment to the Employers Liability Act of 1910 is void so far as it seeks to take the right of removal from a defendant in a state

court where he has the right by reason of some other law regulating removals. That Congress has no right, after organizing the Federal District Court and giving it jurisdiction of certain causes, and the right of removal in general to go farther and provide in certain enumerated causes that the plaintiff may take away the jurisdiction rightfully conferred.

If we admit the power of Congress to empower the plaintiff to deny jurisdiction of the Federal Court, then it can empower the defendant to deny that jurisdiction, or it can provide that either can deny jurisdiction and it can deny jurisdiction in the Federal Court all together in those enumerated cases, and that too without assigning any reason for the disfavor, and we have not been furnished any reason in the case at bar.

When the Legislature creates a cause of action or provides a remedy and grants jurisdiction to two co-ordinate courts, and gives the plaintiff in the cause the right to decide which court shall try the cause to the exclusion of the other, there should be a manifest reason for the favoritism.

Recurring again to the rights of the non-resident defendant, the Constitution extends to the judicial power of the Union to suits against him and this was plainly to enable him to get away from local adverse influence to try the merits of his cause, but if the plaintiff has the right to select the forum and defendant is bound by the selection, then the judicial power of the union will be curtailed and the non-resident excluded from its protection, for there will be no Federal question to support a writ of error from this court, to the State Court.

I am persuaded that the act of 1910, forbidding removal was dictated first by a desire to place the employe of the interstate carrier in a higher niche of favoritism than the ordinary litigants ,and second the railroads, and especially the large railroads doing an interstate business, was the easiest victim.

When we admit the principle that certain persons may be denied a hearing in the forum provided for ordinary litigants, we have allowed a step in the path of favoritism that it is difficult to say now where it will lead.

Equality before the law has ever been the theme of the just and the "Beacon of the wise." Shall we now abandon it, and be guided in our journey through the wilderness of modern instances by the changeful light set up by Congress at the behest of those seeking a basis to ask favors from the Court? So far as I have seen this is the first attempt to favor a litigant by giving him the right and power to choose his forum and thus annul the general rule of jurisdiction. The character of the business regulated, has justified many seemingly partial laws.

Second Employers Liability Act, cases 223 U. S. 52.

Lindsley vs. Carbonic Gas Co., 220 U. S. 411.

But here it is not the business that is regulated, that was done by the act of 1908, but the jurisdiction of the Courts that is made the subject of the partial laws.

The Texas Pacific Railway Co. by virtue of the powers, rights and duties, granted to it and imposed upon it by its charter has the right to carry its litigation to the Federal Court and it is manifest that Congress was not conscious of amending that charter when it passed the proviso to Section 28 of the Judicial Code, and its charter rights should not be taken away just to give a plaintiff a right to sek and retain the forum of his choice. The right to seek the Federal Courts would be barren if it could be obtained only with the consent of ones adversary.

The law fixes the jurisdiction of the courts, and this fixed jurisdiction can not be taken away by the objection of one of the litigants if an objection to the jurisdiction destroys it then it does not exist potentially.

If Relator's contention be correct then if the State Court refuses to remove a cause we have no remedy, and if the Federal District remands the cause we have no remedy, so then we are at the mercy of the state although we have a cause within the constitution grant of judicial power, and within the general removal statute, and the only objection to our going to the Federal Court is because the plaintiff in the particular cause prefers the State Court.

We pray that the mandamus be refused.

F. H. PRENDERGAST,
Marshall, Texas.
For Respondent.

EX PARTE ROE.

PETITION FOR WRIT OF MANDAMUS.

No. 13, Original. Argued April 6, 1914.—Decided May 25, 1914.

When a Federal court decides that a case removable from a state court on independent grounds is not made otherwise by § 6 of the Employers' Liability Act, the decision is a judicial act done in the exercise of jurisdiction conferred by law, and, even if erroneous, is not open to collateral attack, but only subject to correction in an appropriate appellate proceeding.

The authorized mode of reviewing such a ruling in an action at law is by writ of error from the final judgment. Judicial Code, §§ 128, 238.

The writ of mandamus lies to compel the exercise by a judicial officer of existing jurisdiction but not to control his decision.

Mandamus may not be used to correct alleged error in a refusal to remand, especially where the order may be reviewed after final judgment on writ of error or appeal. *Ex parte Harding*, 219 U. S. 363.

THE facts, which involve the Removal Acts and also the construction of the provisions of § 6 of the Employers' Liability Act of 1908 as amended in 1910 relating to removal of causes arising under the latter act, are stated in the opinion.

Mr. S. P. Jones for petitioner.

Mr. Joseph W. Bailey and *Mr. F. H. Prendergast* for respondent.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

By an action begun in a state court in Harrison County, Texas, W. L. Roe sought to recover from the Texas & Pacific Railway Company, a Federal corporation, $30,000 as damages for personal injuries sustained through its negligence while he was in its employ as a brakeman and while both were engaged in interstate commerce. In due time and in the accustomed way, the case was removed into the District Court of the United States for that district upon the sole ground that it was one arising under a law of the United States in that the defendant was chartered by an act of Congress. The plaintiff then moved that the case be remanded upon the ground that it also arose under the Federal Employers' Liability Act (April 22, 1908, 35 Stat. 65, c. 149; April 5, 1910, 36 Stat. 291, c. 143) and therefore was not removable. After a hearing, the motion was denied, for reasons assigned in the second branch of the opinion in *Van Brimmer* v. *Texas & Pacific Railway Co.*, 190 Fed. Rep. 394, 397. The plaintiff then petitioned this court for a writ of mandamus commanding

the judge of the District Court to remand the case. A rule to show cause was granted, and the respondent answered that the motion to remand had been denied because, upon consideration, he believed the case was lawfully removed.

As the case arose under a law of the United States, namely, the defendant's Federal charter (see *Pacific Removal Cases*, 115 U. S. 1; *Texas & Pacific Railway Co.* v. *Cody*, 166 U. S. 606), and the requisite amount was in controversy, it is conceded that it was removable unless made otherwise by the fact that it also arose under the Federal Employers' Liability Act. In the sixth section, as amended in 1910, that act declares: "The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." A like restriction upon removals appears in § 28 of the Judicial Code.

The question presented to the District Court by the motion to remand was, whether these provisions were intended to forbid a removal in every case falling within the Employers' Liability Act, regardless of the presence of some independent ground of removal, as in this instance, or only to declare that the fact that a case arises under that act shall not be a ground of removal. Regarding the latter of these alternatives as sustained by the better reasoning, the court denied the motion; and upon this petition for mandamus we are asked to review that ruling, pronounce it erroneous, and direct the respondent to retract it and remand the case.

Whether the ruling was right or wrong, it was a judicial act, done in the exercise of a jurisdiction conferred by law, and, even if erroneous, was not void or open to collateral attack, but only subject to correction in an appropriate appellate proceeding. *Chesapeake & Ohio Railway Co.* v.

McCabe, 213 U. S. 207; *In re Metropolitan Trust Co.*, 218 U. S. 312. Like any other ruling in the progress of the case, it will be regularly subject to appellate review after final judgment, and the authorized mode of obtaining such a review, the action being at law, is by a writ of error. Judicial Code, §§ 128, 238; *Missouri Pacific Railway Co.* v. *Fitzgerald*, 160 U. S. 556, 582.

The accustomed office of a writ of mandamus, when directed to a judicial officer, is to compel an exercise of existing jurisdiction, but not to control his decision. It does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, especially where in regular course the decision may be reviewed upon a writ of error or an appeal. *Bank of Columbia* v. *Sweeny*, 1 Pet. 567; *Life and Fire Insurance Co.* v. *Adams*, 9 Pet. 571, 602; *Ex parte Taylor*, 14 How. 3, 13; *Ex parte Many*, *Id.* 24; *Ex parte Newman*, 14 Wall. 152, 169; *Ex parte Sawyer*, 21 Wall. 235; *Ex parte Flippin*, 94 U. S. 348; *Ex parte Loring*, *Id.* 418; *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte Baltimore & Ohio Railroad Co.*, 108 U. S. 566; *American Construction Co.* v. *Jacksonville &c. Co.*, 148 U. S. 372, 379; *In re Atlantic City Railroad*, 164 U. S. 633; *Ex parte Oklahoma*, 220 U. S. 191, 209; *Ex parte First National Bank*, 228 U. S. 516. And this is true of a decision denying a motion to remand. *Ex parte Hoard*, 105 U. S. 578; *In re Pollitz*, 206 U. S. 323; *Ex parte Nebraska*, 209 U. S. 436; *Ex parte Gruetter*, 217 U. S. 586; *Ex parte Harding*, 219 U. S. 363. In the last case the subject was extensively considered and it was held that the writ of mandamus may not be used to correct alleged error in a refusal to remand where, after final judgment, the order may be reviewed upon a writ of error or an appeal. To that view we adhere, and therefore we are not here at liberty to consider the merits of the question involved in the District Court's ruling.

Rule discharged; petition dismissed.